Some New Trends in Romanian Criminal Law Legislative Development

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Abstract

In the last period of time previous to the moment of elaborating this article (from around 2017 to 2019), the Romanian legislator (either the primary one: the Parliament, or the delegate one: the Government) manifested an intense and constant preoccupation regarding the modification of the current (and still relatively new) Criminal Code, and in general, of changing different parts of the criminal legislation dating from 2009 (year of conception and official publication), but who went into force only in 2014 (on the 1st of February).

This political will often went into conflict with the general view of justice projected by some representatives of the civil society and by some of the most important professions in the juridical field of occupation (e.g.: the judges and the prosecutors), giving rise to extended media coverage, endless discussions, (sometimes) street manifestations and even some quasi-riot like phenomenon in several cities and towns in Romania (and especially in the capital of the country), polarizing most of the society and maintaining a general state of pressure.

The interesting outcome (namely, that none of the most important modifications proposed and/or adopted by the legislator, in this period, didn't actually went into force, most of them being rejected by the Constitutional Court of Romania), is only surpassed by the peculiarity of inconsistency of the new proposals that now occur, in comparison with the former one's (the red thread being that the legislator seems to be set on changing at least some parts of the current criminal legislation, though it is still a new legislation).

In this article, the author will present and critically comment some of this new tendencies revealed in the last period by the current criminal law legislature of Romania, in order to diagnose the trends of criminal law evolution (or involution) that currently occur in the Romanian legislative landscape, the focus being set onto the general aspects of criminal law that the legislature proposed to change (taking into consideration, among others, the scientific specialization of the author in the general part of the criminal law).

Keywords: *Romanian Criminal Code, Romanian Constitutional Court, constitutionality, Emergency Ordinance*

1. Legal frame and context

On the 1st of February 2014, a new Criminal Code entered into force in Romania; it was enacted since 2009 (Law no. 286/2009)[1], and it replaced the Criminal Code

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[1] Published in the Official Monitor of Romania (M. Of.) no. 510/2009; the Romanian Criminal Code can be consulted online, (among others) at the Internet address (verified on 18th of Nov. 2019):

drawn up during the period in which the communist regime was established, which had been into force since 1969 (Law no. 15/1968)[2]. Despite the relatively new character of this essential normative act, amid changes in the political orientation of the governors who took over the state leadership shortly after its entry into force (among other things), the new legislator began to show (again) interest and increasing tendencies to modify / supplement the criminal law. In a generally tense political climate[3], the opportunity of manifesting such a legislative will was questioned by a part of the civil society (and even by some representatives of the main professional bodies existing in the field of justice), there being suspicions that some biased political pressures will disturb the objectivity of the state's criminal policy. That was because at least some measures envisaged were perceived by part of the public opinion as able to benefit, directly or indirectly, to some important political figures, related to the political coalition that dominated in Parliament and which ensured the government at that time, persons who had various ongoing criminal files, which were under investigation or at the stage of trial in front of a criminal court.

In this context, the fact that, objectively, some provisions of the (substantial and / or procedural) criminal law had been declared (meanwhile) unconstitutional by the Constitutional Court of Romania, respectively that the Romanian state had the obligation to implement some legislative solutions assumed through its international obligations (especially as a member state of the European Union), has represented the catalyst for starting the legislative reform process.

This process started with the adoption by the Government of an emergency ordinance for the modification and completion of the Criminal Code and the Criminal Procedure Code (O.U.G. no. 13/2017)[4], with the formal indication in the preamble of the normative act of the reasons previously stated. As some provisions were likely to contribute to the improvement of the procedural situation of some politicians with criminal files under analysis, this operation produced mass demonstrations of civil society and of the opposition (including large street protests in the capital and the main cities of the country). Therefore, this emergency ordinance was repealed shortly,

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http://www.cdep.ro/proiecte/2009/300/00/4/leg_pl304_09.pdf, and the version translated into English is accessible at the Internet address: http://www.just.ro/wp-content/uploads/2016/01/Noul-cod-penal-EN.doc accessed on 18th of Nov. 2019.

[2] Published in the Official Bulletin of Romania (B. Of. – the old name for the current Official Monitor) no. 79-79 bis / 1969 and republished in B. Of. nr. 55-56 / 1973 and in M. Of. no. 65/1997; the previous Romanian Criminal Code can be consulted online, (among others) at the Internet address: http://www.cdep.ro/pls/legis/legis_pck.frame, accessed on 18th of Nov. 2019.

[3] The existing tension is formally and officially invoked even in the preamble to some normative acts of that period, involved in the series of legislative events whose analysis is (also) presented in this article. Thus, for example, in the foundation note of the Government Emergency Ordinance (O.U.G.) no. 14/2017 an express reference is made to this state of tension and to its possible consequence: the real danger of the separation of the society (other terms used / other expressions used in this emergency ordinance, referring to a previous emergency ordinance aiming to modify aspect in the field of criminal law, OUG no. 13/2017, were: massive reactions coming from both the institutions of the judiciary and from other state authorities; the existence of public manifestations in a general context of misunderstanding, which may lead to consequences on the general climate of stability of the society; intensely criticized legal texts).

[4] Published in M. Of. no. 92/2017 (31st of January); the text of this normative act can be consulted online at the Internet address: http://legislatie.just.ro/Public/DetaliiDocumentAfis/186333 accessed on 18th of Nov. 2019.

after only a few days (also by an emergency ordinance, regarding the repeal of the Government Emergency Ordinance no. 13/2017 for the modification and completion of the Criminal Code and the Criminal Procedure Code, as well as for amending the Criminal Procedure Code: OUG no. 14/2017)[5]. As a peculiarity, the abrogation occurred before some provisions of OUG 13/2017 (those regarding material / substantial criminal law) would at least start to enter into force...

Subsequently, taking place, meanwhile, some political transformations and changes in the composition of the executive power, an initiative from the Ministry of Justice started to develop (among others) a draft law amending the Criminal Code and the Criminal Procedure Code. For this purpose, there were also requested the opinions of the criminal law specialists (theorists and / or practitioners), especially considering the need to comply the criminal law legislation with the mandatory solutions pronounced by the Constitutional Court of Romania and to some supranational normative imperatives. Once it reached the legislative forum, this bill was diverted to an ad hoc parliamentary committee, especially set up to this end, named: The Joint Special Committee of the Chamber of Deputies and the Senate for the systematization, unification and assurance of legislative stability in the field of justice. As a result, the normative form finally adopted by the Parliament was extremely different in comparison to the initial draft from which the legislative initiative started (both in terms of substance and form, as well as in scope, sphere of problems addressed, but also regarding some specific solutions that it has chosen).

Consequently, being notified repeatedly, within the framework of the a priori constitutionality control, the Constitutional Court of Romania decided the overall unconstitutionality of this normative act (adopted, but not yet promulgated / published in the Official Monitor)[6], after a somewhat similar prior decision[7], but which had dealt only to certain specific provisions of the legislative project in question. By the last decision thus pronounced, the Constitutional Court of Romania established, however, that despite the legislature's blunders, the legislative approach to elaborate a normative act to modify the criminal law, in order to comply (among others) with the decisions of the Constitutional Court mustn't be abandoned, but only more faithfully carried out in relation to the official objectives indicated and assumed in the note of foundation of the respective normative act.

Therefore, the conclusions drawn in this material are not definitive; there is to be determined in the future to what extent they will or will not materialize, in the process (still pending) of normative adaptation of the national criminal law in Romania to the standards imposed by the compulsory jurisprudence of the Constitutional Court of Romania, as well as by norms of the European Union (supranational level). Thus, in correspondence with the objectives and theme of the symposium that occasioned this

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[5] Published in M. Of. no. 101/2017 (5th of February); the text of this normative act can be consulted online, at the Internet address: http://legislatie.just.ro/Public/DetaliiDocument/186389 accessed on 18th of Nov. 2019.

[6] See the decision of the Constitutional Court of Romania (CCR) no. 466/2019 (on the 29th of July), published in M. Of. no. 862/2019 (on the 25th of October); the text of the decision can be consulted online at the Internet address: http://legislatie.just.ro/Public/DetaliiDocument/219100 accessed on 18th of Nov. 2019.

[7] See the decision of the Constitutional Court of Romania (CCR) no. 650/2018 (on the 25th of October), published in M. Of. no. 97/2019 (on the 7th of February); the text of the decision can be consulted online at the Internet address: http://legislatie.just.ro/Public/DetaliiDocumentAfis/210596 accessed on 18th of Nov. 2019.

article, the current material only presents some possible trends in the development of contemporary Romanian criminal law.

2. A panoramic view and brief comment on some modifications of the General part of the Romanian Criminal Code recently intended by the legislature, but unfulfilled yet

Starting from the aforementioned considerations – regarding the criminal reform desired by the modern Romanian criminal legislator, which is still (still) unaccomplished, given the intervention of the Constitutional Court, prior to the promulgation and entry into force of the law amending the Criminal Code – we will briefly mention and analyze some new normative trends regarding a few provisions from the general part of the Romanian Criminal Code.

- Firstly, the legislature sought to modify the text applicable in case of emergence of a more favorable criminal law until the final judgment of the case (the hypothesis regulated by article 5 from the Criminal Code), in the sense of expressly stating the absolute prohibition for the judicial bodies to create a *lex tertia*[8]. This completion of the legal text was due to the existence of Decision no. 265/2014 of the Constitutional Court[9], which imposed a strict global comparison of successive criminal laws in order to apply only one of them as a more favorable law, and not a combination of favorable dispositions regulated in various laws, some in force at the time of judgement, and some abolished or modified. This decision practically invalidated the existence of the so-called *criminal law institutions with autonomous application* (concept whose existence, widely accepted in most of the Romanian criminal doctrine from that moment and in the mandatory criminal practice issued by the supreme court[10]) strongly relativized the formal prohibition to create a *lex tertia* in the process of applying the *mitior lex* principle (by accrediting a restrictive interpretation of the *lex tertia* notion and of the prohibition of its application).[11] Although the newly used

[8] The prohibition to create *lex tertia* in the process of applying the more favorable criminal law means that the judge may not combine the most favorable dispositions from two or more criminal laws that had been into force from the time when the crime was committed, until the moment when the final judgement is passed; instead, the court must compare the two or more criminal laws, in their entirety, and pick only one of them, as the most favorable, as a whole, who will be applied under the aspect of all its provisions related to the case. The judge may not copy only the most favorable dispositions from one law and then paste them together with the most favorable dispositions from another law, thus creating, basically, a third law (*lex tertia*), made up, ad hoc, only from the most lenient dispositions of the laws actually in existence, because such a law was never in the intent of the legislature, and the judge must apply the law as it is, and not create a new law (according to the constitutional principle of separation of state powers).

[9] The CCR Decision no. 265/2014 (from the 6th of May) was published in M. Of. no. 372/2014 (from the 20th of May); the text of the decision can be consulted online at the Internet address (verified on 18th of Nov. 2019): http://legislatie.just.ro/Public/DetaliiDocumentAfis/158344.

[10] See the Decision no. 2/2014 (from the 14th of April), preliminary ruling to settle legal issues of criminal law pronounced by the judicial panel for the settlement of legal issues (regarding criminal law), published in M. Of. no. 319/2014 (from the 30th of April); the text of the decision can be consulted online at the Internet address (verified on 18th of Nov. 2019): www.just.ro/wp-content/uploads/2016/01/Noul-cod-penal-EN.doc.

[11] Basically, by the concept of applying the more favorable criminal law according to the autonomous institutions (which is a more flexible system for applying the mitior lex principle), although

formulation, in the law amending the Criminal Code, regarding the full application of the more favorable criminal law, without the possibility of combining provisions from successive criminal laws, was not *per se* censored by the Constitutional Court (representing precisely the essence of the idea imposed *erga omnes* by CCR's Decision no. 265/2014), however, by the CCR's Decision no. 650/2018, a series of subsequent provisions which were to be added to the text of art. 5 C. pen. (paragraphs 1^1 to 1^4) were invalidated as lacking conformity to the Constitution. Through these provisions, the legislator aimed to establish certain criteria for identifying the most favorable criminal law (occurred before the issuing of the court's final decision), and also, he tried to establish a legal order for their valorization; the judge had to take these criteria into account, in the legally prescribed order, for establishing the more favorable criminal law, in every particular case. The problem was that the order in which these criteria were provided was sometimes objectively impossible to obey (the verification steps were incompatible with the logical procedure imposed in the process of identifying the more favorable criminal law, as it is constantly indicated by the specialized literature and admitted in the stable practice of the judicial bodies).[12] Also, some provisions in this matter from the law amending the Criminal Code, in the form prior to the first decision of the Constitutional Court (no. 650/2018), were redundant, the same idea or variations of the same idea being re-written in separate paragraphs, sometimes in a different way, uncorrelated, or overlapping (at times) with provisions contained in other texts of law (such as those in article 4 of the Criminal Code, regarding decriminalization). Moreover, these aspects had also been highlighted by the advisory opinion of the Legislative Council[13], a document largely ignored by the legislator (which unfortunately represents a relatively constant position of the Romanian legislator). Basically, as the Constitutional Court decided in the first decision regarding this draft of law (no. 650/2018), by the complementary provisions to art. 5 C. pen. the legislature was about to create the paradoxal premise of

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the prohibition of creating a lex tertia is formally stated, it is not considered that this rule is violated unless the provisions of the successive laws are combined regarding one and the same institution (but not when they refer to criminal law institutions with autonomous application). Therefore, under the formal prohibition to create a *lex tertia*, in this conception there are many more hypotheses where one can actually combine more favorable provisions from separate criminal laws, in applying the *mitior lex* principle (without considering that it is so created a *lex tertia*), than according to the other (more rigid) system - which leads, however, to a stricter observance of the principle of separation of state powers, according to the rule that the judge must apply the law, in its entirety, and not create the law, not even from preexisting normative sets, adapted *ad hoc* to particular factual hypotheses.

[12] For example, a certain mandatory order was required to verify the criteria from the perspective of which a criminal law might appear to be more favorable than another, but within this order, the checking of a criterion that has, logically and objectively, priority (namely: taking into account the modification of the conditions for taking criminal responsibility, as it is the criterion of verifying the prescription of criminal liability), was provided only after the checking of a subsequent criterion (namely: the criterion of the potential modification of the sanction prescribed by law for that offense). However, the compulsory imposition of such an order of the criteria for verifying the more favorable character of one law in comparison with another was effectively impossible, challenging scientific laws impossible to modify according to the arbitrary preferences of the legislator (because, in case of prescription of criminal liability, the criminal can no longer be convicted; on the other hand, if a law only provides for a lower sentence than another, then the criminal will be sentenced, but to a less severe sanction; it is obvious that the first alternative is more favorable to the offender).

[13] The opinion of the Legislative Council regarding the law amending the Romanian Criminal Code (PL-x no. 406/2018) can be consulted at the Internet address: http://www.cdep.ro/proiecte/2018/400/00/6/cl557.pdf accessed on 18th of Nov. 2019.

qualifying a harsher criminal law as more favorable one; in addition, some legal formulations were contrary to the principle of application of the more favorable criminal law, as opposed to the CCR's Decision no. 265/2014. All in all, the Constitutional Court of Romania found that the expected changes of article 5 from the Criminal Code were likely to cause confusion and it pronounced them as contrary to the fundamental law.[14]

- The Romanian criminal lawmaker was also concerned about adding a certain nuanced provision to the general regulation regarding a certain form / modality of the criminal guilt, namely the intention, in its most intense form: the direct intention[15]. Thus, according to the majority opinion in the current criminal doctrine, when the norm of criminalization of a certain conduct makes express reference to the existence of a certain purpose, in the pursuit of which the respective act must be committed in order to be considered a crime (or to maintain its existence in an aggravated form of commission), then the form of guilt can only be the direct intention (direct intention qualified by purpose). Aiming at the express normative consecration of this doctrinal rule which, in its current form, may be subject to discussion (it is already contested, in a relatively recent minority opinion), the legislator has envisaged an amendment (through completion) of art. 16 paragraph 1 letter a) C. pen. However, the Parliament has inserted in the supplementary provision some (unclear) procedural provisions – such as that the existence of the direct intention must doubtfully result from the concrete circumstances of the case – which do not have their place in the general criminal law, but, possibly in the Code of Criminal Procedure. In addition, it is unclear why the hypothesis of the existence of a specific motive (reason) for committing the crime (regulated in the constitutive content of certain infractions) was not also expressly provided for, because the majority opinion is that the solution of such a case is in the same sense as if there is a purpose, namely: the restriction of the guilt only to the direct intention.

- Regarding the institution of the continued crime[16] and the modifications regarding its regulation (art. 35 paragraph 1 of the Criminal Code), the legislator had an incoherent attitude. Thus, initially, the draft law amending the Criminal Code provided (at point no. 5) the modification of art. 35 paragraph 1 of the Criminal Code, in what the legislator believed (wrongly) that it is the meaning of CCR's Decision no. 368/2017.[17] Essentially, by the CCR's Decision no. 650/2018 it was established that

[14] See paragraphs 249-265 of the CCR's Decision no. 650/2018.

[15] According to article 16 paragraph 1 letter a) of the Romanian Criminal code, an action is committed with intent when the perpetrator can foresee the outcome of their actions, in the expectation of causing such outcome by perpetrating the act (representing what the doctrine calls *direct intention*); there is also another mode of intention (called in the doctrine: indirect), provided for in article 16 paragraph 1 letter b) of the Criminal Code: an action is committed with intent when the perpetrator can foresee the outcome of their actions and, while not intending to produce it, nevertheless accepts the likelihood that it will occur.

[16] According to article 35 paragraph 1 of the Romanian Criminal code, an offense is said to be continuing when a person commits, at various time intervals but for the realization of the same resolution [and against the same passive subject*], actions or inactions each having the content of the same offense. *The part regarding the unity of the passive subject was declared unconstitutional by the Constitutional Court – Decision no. 368/2017.

[17] CCR's decision no. 368/2017 (pronounced on the 30th of May) was published in M. Of. no. 566/2017 (on the 17th of July); the text of the decision can be consulted online at the Internet address (verified on 18th of Nov. 2019): http://legislatie.just.ro/Public/DetaliiDocumentAfis/191292. By this it was decided that the legal imposition of the uniqueness of the passive subject as a general condition

the criminal lawmaker misinterpreted those previously established by the Constitutional Court, regarding the continued crime, by Decision 368/2017. As a result, resuming the legislative process, the legislator considered that it is simpler to give up altogether the modifications regarding the disposition of art. 35 paragraph 1 from the Criminal Code! However, this solution was censored by the CCR's Decision no. 466/2019, as it practically violates the obligation of the Parliament to reconcile the Criminal Code with some mandatory decisions made by the Constitutional Court, which was one of the main goals assumed by the draft legislative amendment thus started![18]

- The legislator was also concerned about the partial modification of the sanctioning regime of the multiple concurrent offenses.[19] Thus, according to the provisions of art. 39 of the Criminal Code, in case of multiple concurrent offenses, there exist and are used several systems of sanctioning the criminal plurality thus committed, depending on the gravity of the crimes that compose it (which is reflected in the individual penalties established for each of these crimes).[20] In addition, the Criminal Code of 2009 brought, as an innovation, in the matter of sanctioning the multiple concurrent offenses, the possibility of applying as a resultant punishment, under certain express and limiting conditions provided by law, the sentence of life imprisonment, even if it was not established for none of the concurrent offenses and even if it is not even provided by law for any of them (art. 39 par. 2 of the Criminal Code).[21] The legislature initially wanted the penalty increase applicable to prison

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for the existence of a continuing crime is unconstitutional (what the 2009 Criminal Code legislator had introduced as an innovation compared to the previous regulation of the continued crime). By the draft law amending the Criminal Code PL-x no. 406/2018, the legislator sought to amend art. 35 paragraph 1 C. pen. not only by its partial repeal (extracting from the text the reference to the uniqueness of the passive subject), but it also disposed in the following sense: „An offense is said to be continuing when a person commits, at various time intervals but for the realization of the same resolution, actions or inactions each having the content of the same offense. *In the case of offenses against the person, the continued form is retained only when the facts are committed against the same passive subject*". However, this express provision, which excluded the condition of the unity of the passive subject, in the case of the continuing offenses directed against other social values than the person (for example: the patrimony), but maintained this condition, generally, on all categories of offenses directed against the person, was regarded by the Constitutional Court, through Decision no. 650/2018, as not being in accordance with the meaning of its previous statutes, from Decision no. 368/2018; see paragraphs 278-289 of Decision no. 650/2018.

[18] See paragraphs 125, 147-150, 157-162 and 164-169 of CCR's Decision no. 466/2019.

[19] According to article 38 par. 1 of the Romanian Criminal code: *There exist multiple (concurrent) violations when two or several violations have been committed by the same person, via various actions or inactions, before receiving a final conviction for any of them. There also exist actual multiple violations when one of those has been committed in order to commit or conceal another offense*; the second paragraph stipulates: *There exist formal multiple (concurrent) violations when an action or inaction committed by a person, because of the circumstances under which it occurred and because of the consequences it produced, contains the elements of several violations*.

[20] The absorption system is adopted if at least one of the crimes committed drew the establishment of a life imprisonment; the system of legal cumulation with fixed and compulsory penalty increase is provided if all the concurrent offenses have determined the establishment of penalties of the same kind: either imprisonment or fine (in this case, to the most severe penalty a mandatory increase is added of 1/3 of the sum of other similar penalties); it was chosen the arithmetic cumulative system when a prison sentence and a fine are imposed, the two being executed entirely.

[21] According to article 39 par. 2 of the Romanian Criminal Code: *When several penalties of imprisonment have been established, if, by adding to the heaviest penalty a third of the total of all other penalties of imprisonment, and for at least one of the multiple offenses the penalty provided by law is 20 years or more, the penalty of life imprisonment can be applied*.

and fine to be neither mandatory nor fixed, but to be an optional and variable increase (as in the former regulation), expressed as follows: in the case of prison sentences, by a maximum, predetermined number of years that can be applied to the basic punishment, from which it starts in the construction of the resulting punishment for the multiple concurrent offenses (the applicable increase was, in this vision, for a maximum of 3 years); in the case of fines, a maximum fraction (related to the maximum penalty provided by law for the offense that generated the highest concrete fine), which could not be exceeded (1/3 of the maximum punishment provided by law). By Decision no. 650/2018, the Constitutional Court decided that although, in principle, the legislator has the right to adopt any type of criminal policy he considers to be appropriate at a certain time, he must nevertheless do so in a correlated and balanced way. In the view of the constitutional litigation court, a relaxation of the sanctioning regime of the multiple concurrent offenses (as it resulted from the changes desired by the legislator) should, therefore, have been compensated by a systematic increase of the limits of the penalties provided for by the law for most of the infractions (which this was not the case), in order not to distort a coherent criminal policy of the state. As a result, some expected changes in this matter were declared unconstitutional, while others were considered appropriate, from this point of view (in our opinion, with at least arguable argument regarding the criterion of distinction between the two categories). Essentially, it was appreciated that regarding the hypothesis in which all the penalties established for the concurrent offenses are criminal fines, the increase may be optional and variable, but, if they are imprisonment penalties, the increase must remain mandatory and non-variable.[22] In the process of correlating the law amending the Criminal Code with Decision no. 650/2018 of the Constitutional Court, the legislator has, however, again misinterpreted some of the court's statutes. Thus, the modification of a text (art. 39 paragraph 1 (e) of the Criminal Code) was renounced, although its intended modification had not been declared unconstitutional. As a consequence, some problems of correlation with other texts also appeared, the new disposition of modification becoming partially incoherent and absurd (inapplicable).

- The same criticisms previously made regarding the amendments referred to by the criminal lawmaker on the topic of the sanctioning of the multiple concurrent offenses (indicated above, regarding the failure to take over and to correct some provisions in the law of modification, in the form existing after the Decision no. 650/2018 of the CCR) can be also formulated with regard to several other dispositions whose modification was aimed at by the legislator, the problem being therefore a systematic one, and not a punctual / short-term one. For example, in this framework it may be mentioned the renunciation of introduction of a new article in the Criminal Code, art. 159^1, which, in conjunction with the compulsory jurisprudence in this matter and with the provisions of the special law on mediation[23], would have expressly provided in the Criminal Code a new cause for the removal of the criminal liability applicable to certain offenses, namely: conclusion of a mediation agreement regarding the criminal side of some cases. It should be mentioned that this *sui-generis* cause for the elimination of criminal liability (with this specific legal qualification)

[22] See paragraphs 290-313 of CCR's Decision no. 650/2018.

[23] Law no. 192/2006, regarding the mediation and organization of the profession of mediator, was published in M. Of. no. 441/2006; this law can be consulted online at the Internet address http://legislatie.just.ro/Public/DetaliiDocument/71928, accessed on 18th of Nov. 2019.

exists at this time, but not according to a provision contained in the Criminal Code, but according to the provisions of art. 67 paragraph 22 of Law no. 192/2006.

- The criminal lawmaker also considered the repeal of another innovation brought by the Criminal Code of 2009, namely the possibility of applying a fine with and a prison sentence (cumulative main penalties), if the crime was committed in order to obtain a material gain (art. 62 from the Criminal Code[24]). Also, some modifications were mentioned in case of replacement of the fine with the obligation to perform unpaid work in the benefit of the community, or in case of replacing it with a prison sentence, in case of non-payment made without ill-faith (art. 64 of the Criminal Code). In the context in which some of these changes were interpreted by the Constitutional Court (by decision no. 650/2018) as being likely to violate the constitutional prohibition of imposing forced labor, the legislature has restricted the area of the changes initially envisaged in this domain.

- The legislator also intends to extend the scope of mitigating circumstances, including by expressly stipulating the illustrative character of the optional ones (modifications regarding art. 75 par. 2 of the Criminal Code). It should be noted that this amendment does not tend to be confined to the purpose of initiating this draft law, since this matter is not about putting legislation in accordance with the decisions of the Constitutional Court, nor about connecting to supranational regulatory standards.

- The legislature also considered changes in the matter of suspension under supervision of the execution of the sentence, as well as in the field of conditional release (parole). Essentially, the newly envisaged conditions of release were more favorable, the minimum fractions of served penalty after which the convicted criminal would become eligible for release being reduced, in relation to the current provisions. However, certain formulations initially used by the lawmaker, beyond their predominantly procedural burden, were considered as inappropriate, even as a sign of the legislator's misunderstanding of some essential notions, such as "evidence" (for example, it was stipulated as a condition of granting the release, that there is no evidence for the court to assess that the convicted person would not and could not reintegrate into society).[25] As a result, the legislator revised his formulations and provided in a clearer and uncontroversial form the rules he aimed to express.[26]

- In accordance with the objective assumed by the explanatory statement of the draft law amending the Criminal Code, a concern was also the correlation of some provisions of the national criminal law with the supranational regulatory standards assumed by Romania. Thus, taking into account Directive no. 2014/42 / EU of the European Parliament and of the Council from the 3rd of April 2014, on the freezing and confiscation of the instruments and products of the crimes committed in the European Union, the Romanian criminal legislator aimed to modify the provisions contained in art. 112^1 of the Criminal Code, which regulates, as a specific sanction of criminal law (namely, a security measure), the extended confiscation. According to Romanian criminal law, the security measures represent sanctions of criminal law different from punishments (specific criminal sanctions for major offenders and for legal persons), as

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[24] According to article 62 par. 1 of the Romanian Criminal Code: *If the committed offense was intended to provide a material gain, the penalty by imprisonment can be accompanied by a penalty by fine*.

[25] See paragraphs 373-377 of CCR's Decision no. 650/2018.

[26] In the form subsequent to the CCR's Decision no. 650/2018, the condition envisaged is worded as follows: the court is convinced that the convicted person has rectified its behavior and can be reintegrated into the society (nothing is mentioned anymore about "evidence").

well as from the educational measures (specific criminal sanctions for minor offenders). Thus, they constitute a special kind of criminal law sanctions, characterized in that they do not represent consequences of criminal liability for a crime, but only consequences of committing an unjustified conduct described by the criminal law. As a rule, security measures shall be taken against persons who commit simple unjustified acts provided by the criminal law[27], even though those acts cannot be effectively qualified as infractions, because they do not meet all the other essential features of the crime (for example, they are not imputable to the person who committed them, or that person did not manifest the specific type of guilt the criminal law required for that act to be punishable as criminal). However, the extended confiscation, introduced in the national legislation in 2012, also as an effect of the need to respect the supranational (European) regulatory standard, is a relative exception, because, although formally it is not a consequence of the criminal responsibility for committing an offense, it is however (the single security measure) conditioned by this premise. Thus, this is the only security measure that can be disposed of only when the deed was retained / qualified as a crime, and there are a number of other specific / particular conditions expressly provided by art. 112^1 of the Criminal Code. Broadly speaking, in essence, these conditions refer to: the classification of the offense committed in the limiting list provided by law, according to art. 112^1 paragraph 1 letters a)-q) from the Criminal Code; the existence of a penalty provided by law of 4 years or more, stipulated for the respective offense; the existence of the possibility that the crime thus committed may give the offender material benefit; finding that the value of the goods acquired by the convicted person within a period of 5 years before and after the time of the crime, until the date when the criminal court is formally notified with its judgment, clearly exceeds the revenues obtained by him / her legally[28]; the existence of the court's persuasion that the goods envisaged come from criminal activities of the nature of those in the limiting list provided by law. According to the law amending the Criminal Code, in the initial form (prior to the CCR's Decision no. 650/2018), the legislator partially modified these provisions, but (in an overall assessment) in a sense that was not strictly in accordance with the provisions contained in it in Directive no. 2014/42 / EU of the European Parliament and of the Council from the 3rd of April 2014, although this was formally the officially stated purpose of the amendment. Essentially, given that according to the European standard in this matter it can be stated that an enlargement of the scope of the extended confiscation is concerned (by comparison to the current state of the Romanian legislation in this field), the Romanian lawmaker intended to regulate this institution in an even more restrictive manner. In addition, the formulations envisaged by the legislature, at this stage, were sometimes contradictory and even incapacitating for the extended confiscation, raising the level of probation necessary to dispose of this criminal law sanction at almost the same level imposed and for the (distinct) security measure of special confiscation (a security measure pre-existing in the Romanian legislation).[29] Most of these aspects

[27] According to article 107 of the Romanian Criminal Code: *(1) Security measures seek to eliminate any state of hazard and to prevent the commission of offenses provided by criminal law. (2) Security measures are taken against a person who committed an unjustified offense under criminal law. (3) Security measures may also be taken in case no penalty is applied to the offender*.

[28] For this evaluation, there must be taken into account: the value of the goods at the date of their acquisition, the expenses incurred by the offender and his / hers family members as well as the value of the goods transferred to his / hers family members or to a legal person he / she controls.

[29] In the case of special confiscation, a certain link must be proved effectively between the confiscated good and the commission of the unjustified deed provided by the criminal law (e.g.: the

were properly censored by the CCR's Decision no. 650/2018.[30] As a consequence, the criminal lawmaker reverted to the changes he intended to make in the matter of extended confiscation, among others eliminating the limiting list of crimes for which this sanction can intervene, but without corroborating the rest of the provisions of art. 112[1] from the Criminal Code with this elimination. Therefore, there would have been legal provisions, in subsequent paragraphs of the article, regarding the persuasion of the court that confiscated goods come from committing criminal activities similar to those regulated in par. 1, under the conditions in which this paragraph no longer expressly regulated certain categories of offenses to which this condition could be verified (which would have practically led to the inapplicability of the institution). Along with a number of other inconsistencies, these problems have led to a new pronouncement of the unconstitutionality of the provisions for amending the Criminal Code (prior to their promulgation), by the Constitutional Court (Decision no. 466 / 2019).

- The Parliament also considered reducing the duration of certain terms of prescription of criminal liability, in comparison to the current regulatory stage, but (curiously), not in the case of all crimes. Thus, the duration of prescription periods for very serious offenses (those for which the law provides for the punishment of life imprisonment or imprisonment of more than 20 years) and for two categories of offenses of minor gravity (namely those for which the law provides for a higher prison sentence then one year, but not more than 5 years, respectively those for which the law stipulates the penalty with the fine or imprisonment of maximum 1 year) would remain unchanged (namely: 15 years in the first case, 5 years in the second case and 3 years in the third case).[31] Instead, the legislature aimed to change the term of limitation of criminal liability for two categories of medium gravity offenses, in order to reduce the duration of this term, thus: for offenses for which the law stipulates the prison sentence of more than 10 years, but which does not exceed 20 years, the prescription term would decrease from 10 to 8 years; for offenses for which the law stipulates the prison sentence of more than 5 years, but which does not exceed 10 years, the prescription term would decrease from 8 to 6 years.[32] The inexplicable character of this decision of criminal policy, unsolicited by doctrine and practice and completely devoid of problems in law enforcement, raised some question marks for certain segments of the population. There were suspicions that the legislature (in which the political power was ensured by the coalition at that time in government) aimed in particular to create the legislative framework conducive to extinguishing the criminal responsibility of prominent political personalities (with important functions in the state apparatus and within the political parties that were members of the respective ruling coalition) who were prosecuted at the time on the charge of committing crimes that, by a difficult to ignore coincidence, were part of the categories of offenses whose prescription term was to be reduced.

- Also, the legislator aimed at reducing the duration of the special prescription term, by returning to the previous solution (recently abandoned): exceeding by half more the duration of the ordinary prescription term (and not exceeding it once again, as foreseen at the moment), would have to attract the consideration as prescribed of the

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good must come from committing that act; the good must have been used in the crime or to ensure the escape of the perpetrator etc.).

[30] See paragraphs 389-413 of CCR's Decision no. 650/2018

[31] See the provisions of art. 153 par. 1 letters a), d) and e) of the Criminal Code.

[32] See the provisions of art. 153 par. 1 letters b) and c) of the Criminal Code.

crime committed, no matter how many interruptions of its term would have taken place. Although these legislative solutions were not considered unconstitutional by the Constitutional Court, they represented a main reason for the social disturbances and mass demonstrations organized in Romania during the last years, by various representatives of the civil society and of the political opposition to the governing power (from the moment of making these legislative proposals). Moreover, as we have already mentioned, those amendments were not requested by theorists or practitioners of criminal law, and the formal justification of the legislative initiative, in the explanation of reasons, regarding the need to promptly resolve cases by the judicial bodies, was profoundly unconvincing[33], since it was not envisaged to reduce all the prescription terms, for all categories of offenses.

3. Short conclusion

Objective reasons of economy of time and space did not allow us to point out, also, in this material, some changes that the legislator wanted to bring to the special parts of the Romanian Criminal Code, although those may have agitated the spirits even more. By reviewing only a few of the changes that the current Romanian legislator wanted to make on the Criminal Code (still new!), one can easily observe the profound, sometimes radical, nature of the intended reform, but also the obvious amateurism and partisanship by which it was intended to be carried out. These features are even more obvious if we mention, for example, that through alternative legislative projects to amend the criminal legislation, often coming from the same legislative initiative, it is desired to amend the Criminal Code in some diametrically opposite ways than the ones presented above. For example, after an intense media coverage of a recent case of kidnapping and killing a hitchhiker underaged girl, the Government initiated a draft emergency ordinance[34] that aims (among others) to tighten, under certain aspects, the regime of granting conditional release... In this context, comments tend to remain superfluous!

One can only hope that, with the recent political changes regarding the assurance of the Romanian government, such legislative loopholes will cease, allowing the

[33] In addition, the statement of reasons is actually insulting to the judicial bodies, referring explicitly to the possibility of blackmailing some people whose files have long remained in non-processing, to the existence of illicit research and trial purposes, to abusive investigations etc., in the conditions in which such practices no longer tend to be characteristic for the Romanian judicial system. Such a formal accusation of the legislative power vis-à-vis the judiciary, given that in today's Romania the collective perception is more favorable to the correctness of the latter, being generally circumspect with regard to the verticality of the representatives of the political class, it has been perceived by large groups of the population as a demagogic and hypocritical attack, especially given the lack of evidence to support / justify such assertions, all the more so as these provisions would undoubtedly be able to help the situation of certain great (V.I.P.) defendants (people with great political visibility). Beyond the indicated aspects, it is to be observed that such an unacceptable positioning of a state power in regard to another one, reveals the existence of a climate of maximum political, social and (inter-) institutional tension, incompatible with the good and general functioning of a state, an aspect that it is urgent to be deeply remedied.

[34] The project and the foundation note of this project can be consulted online at the Internet address: http://www.just.ro/proiect-pentru-modificarea-legislatiei-penale-si-procesual-penale-in-cazul-infractiunilor-grave-si-foarte-grave-contra-persoanei-in-special-in-situatiile-in-care-este-afectata-valoarea-sociala-supre/ accessed on 18th of Nov. 2019.

legislator to worry about solving the real incongruities that crush the domestic criminal legislation, without further following various regulatory chimeras with special recipients. The future will reveal the extent to which this hope will be fulfilled or not, since, by decision no. 466/2019, the Constitutional Court established that, despite the overall unconstitutionality of the law amending the Criminal Code, in the form adopted by the Parliament after the decision no. 650/2018 of the Constitutional Court (regarding the initial version of this law), the legislator must, however, resume the legislative process and finalize it in correspondence with the goals initially assumed, through the explanatory memorandum to the draft of this law. We only wish that the manner in which this operation will be carried out will be more coherent, more objective and more professional than the one in which this true saga of the recent modification of the new Romanian Criminal Code began.

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